COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

114 SYLVAN STREET, L.L.C.

v.

DANVERS BOARD OF APPEALS

No. 02-04

RULING ON MOTION FOR SUMMARY JUDGMENT

February 28, 2003

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I. PROCEDURAL HISTORY

On July 29, 2002, 114 Sylvan Street , L.L.C., submitted an application to the Danvers Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable housing on Sylvan Street in Danvers. Six of a total of 24 condominium units would be sold to low or moderate income families. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF). After due notice and public hearings, the Board unanimously denied the permit by decision filed with the town clerk on September 11, 2002, and the developer appealed the decision to the Housing Appeals Committee. The Committee opened its hearing, as provided in 760 CMR 30.09(4), with a conference of counsel. Acknowledging that there are no facts in dispute, the parties filed an Agreed Statement of Facts and cross motions for summary judgment to determine the applicability of a provision of our regulations.

II. DISCUSSION

Central to the statutory scheme of the Comprehensive Permit Law is the concept of "consistency with local needs." The law provides that "[t]he hearing by the Housing Appeals Committee... shall be limited to the issue of whether, in the case of a denial of an application, the decision of the board of appeals was reasonable[1] and consistent with local needs...." G.L. c. 40B, § 23. Among the ways in which "consistent with local needs" is defined in section 20 of the statute is by reference to a benchmark against which each town's progress in providing affordable housing is to be measured. That is, if the town has made sufficient progress, the statute offers what is in effect an affirmative defense that may be raised by the Board if its denial of a permit is appealed to this Committee: "Requirements... shall be consistent with local needs when imposed... in a city or town where... low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest federal decennial census...." G.L. c. 40B, § 20. A regulatory framework for calculating each community's progress toward this ten percent threshold, its "housing unit minimum," is provided in our regulations, and the Department of Housing and Community Development's (DHCD) is required to maintain a Subsidized Housing Inventory. 760 CMR 31.04(1).

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1. In the first case interpreting the statute, the Supreme Judicial Court indicated that the word "reasonable" is "surplus verbiage which does not add any substance to the 'consistent with local needs' standard." *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 366 n.17, 294 N.E.2d 393, 413 n.17 (1973).

The importance of the ten percent threshold has been extended by our regulations. Section 31.07(1)(d) provides that "[a] decision by a Board to deny a comprehensive permit... shall [also] all be consistent with local needs if the municipality has made recent progress toward its housing unit minimum." "Recent progress," in turn, is defined to mean "that the number of housing units that have been *created* during the twelve months prior to the date of the comprehensive permit application *and* that *count* toward the housing unit minimum.... is equal to or greater than 2% of the municipality's total housing units." 760 CMR 31.07(1)(d) (emphasis added).

Within the twelve months prior to 114 Sylvan Street's comprehensive permit application of July 29, 2002, the Danvers Board of Appeals had issued (on June 24, 2002) a comprehensive permit to Northland Swingaway, L.L.C.[2] No building permits have yet been issued for that development, but it will contain 258 Chapter 40B units.[3] These 258 units are more than two percent of Danvers' total housing units.[4] The developer concedes that under § 31.07(1)(d) the 258 units *counted* toward the housing unit minimum when the comprehensive permit became final.[5] It argues, however, that there is a separate requirement

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2. Agreed Statement of Facts, ¶ 3. Though the permit was "issued" on June 17, it was not filed with the town clerk until June 24. We consider the latter date to be the relevant date for all purposes under our regulations. See 760 CMR 30.06(8), 31.08(4). Without such a uniform rule, there might well be confusion. The board's decision may be voted on one day, and the written document signed on another. It may be filed with the town clerk on yet another day, and delivered to the applicant on a fourth. Chapter 40B, § 22 establishes the time for appeal as "within twenty days after the date of the notice of the decision...." Since the date on which the decision is filed with the clerk is the date that the public receives notice of it, and since that date is likely to be the most unambiguous and clearly documented, § 30.06(8) of our regulations clarifies the statutory provision by indicating that the date of notice is the date the decision is filed with the clerk.

3. Agreed Statement of Facts, ¶ 4.

4. The April 24, 2002 Subsidized Housing Inventory showed 9,712 total housing units in Danvers. Agreed Statement of Facts, ¶ 13.

5. Appellant's memorandum (filed Dec. 2, 2002), p. 7.

that the housing units be *created*. That is, the question posed here is whether the housing units in this development were "created" under the regulation when the comprehensive permit was issued, or whether the town must wait until they have actually been constructed to receive credit for "recent progress" toward the ten percent housing unit minimum.

Generally, in construing language such as this, none of the words is to be regarded as superfluous. *Commonwealth v. Super*, 431 Mass. 492, 494, 727 N.E.2d 1175, 1181 (2000). The developer argues that to give full meaning to the conjunction "and" there must be two independent requirements. First, the units must count, that is, they must have received a comprehensive permit, and second, they must have been created, which must have a meaning distinct from having been permitted. Therefore, it is argued, "created" must mean constructed.

We disagree. The word "created" would not be commonly used in the context of the construction of buildings. This suggests that the drafter, by choosing a word less common than "constructed" or "built," intended a different meaning.[6] The language is not plain and unambiguous, and therefore it is appropriate for us to look at the purpose of the regulation and the entire statutory scheme of which it is a part. *Commonwealth v. Ray*, 435 Mass. 249 252, 755 N.E.2d 1259, 1261 (2001).

Viewing the regulations as a whole, we attach the most significance to 760 CMR 31.04. It is there, for purposes of measuring overall progress toward the 10% threshold that the policy approach is most unambiguously stated: "units shall be counted when the comprehensive permit becomes final." The policy stated is that progress is to be measured

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6. The comprehensive permit regulations are promulgated by the Department of Housing and Community Development, not the Housing Appeals Committee. G.L. c. 23B, § 5A.

prior to actual construction. It would be anomalous to measure interim, "recent" progress by a different standard. In the context of the Comprehensive Permit Law, we believe that "created" was intended to convey the idea of being made possible or finally approved within the process—that is, permitted. That the regulation refers to counting was intended to reinforce that, not to add an additional requirement. Using the language "created... and ... count" is repetitive, but does not establish two separate requirements.[7] This conclusion is similar to that in *Somerset v. Dighton Water District*, 347 Mass. 738, 742-743, 200 N.E.2d 237, 239 (1964), though we need not go as far as the Court did in that case, construing "and" to mean "or."

7. Similar "created-and-counted" language is found in 760 CMR 31.07(1)(i)(6), and we believe that our analysis is equally applicable there.

III. CONCLUSION AND ORDER

Based upon review of the record and the discussion above, the Housing Appeals Committee concludes that the decision of the Danvers Board of Appeals was consistent with local needs, and the appeal of 114 Sylvan Street , L.L.C. is hereby dismissed.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: February 28, 2003

Werner Lohe, Chairman

Joseph P. Henefield

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